No. 14,843

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. McGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

I. THE AFFIDAVIT STATES FACTS FROM WHICH A SANE AND REASONABLE MIND WOULD FAIRLY INFER BIAS OR PREJUDICE.

The appellees rest their case primarily on the following contention appearing at page 6 of their brief:

> "The affidavit in this case contains no facts from which a sane and reasonable mind could infer bias or prejudice."

This argument is made in the face of the following specific facts and reasons upon which the affiant's belief of bias is based:

1. That Delegate Farrington is asking the Circuit Judge to exercise his discretionary powers in Civil No. 139 by appointing her as trustee, or one of the trustees, of a substantial trust estate in opposition to the desires and wishes of the appellants and their assertion of disqualification;

2. That the Circuit Judge is actively seeking appointment to a Federal judgeship for the District of Hawaii;

3. That the Circuit Judge first announced his candidacy for the Federal judgeship while Civil No. 139 was pending before him and shortly before the matter of the appointment of trustees was to come on for hearing; and

4. That Delegate Farrington, one of the litigants in Civil No. 139, in her official capacity as Territorial Delegate to Congress from Hawaii, virtually holds the key to the judicial appointment which the Judge seeks.

Thus, in the words of the dissenting justice below (R. 37, 38), the Circuit Judge "superimposed a conflicting relationship, to wit, candidate for United States District Judge of Hawaii and territorial delegate from Hawaii" "on top of the relationship of judge and litigant," and thereby brought about "by his voluntary act" an "incompatible relationship with one of the litigants."

These are hard, cold facts, not mere conclusions of law or insinuations. Confronted by such facts, it is incredible that anyone could seriously contend that the affidavit contains "no facts from which a sane and reasonable mind could infer bias or prejudice." A reasonable mind, we submit, should find it difficult to form any other inference from such facts; and unless there is some positive law that prevents it, this Court should act to prevent an obvious miscarriage of justice.

It is apparent from the arguments made at page 15 of their brief that appellees misconceive the standard adopted in *Berger v. United States,* 255 U.S. 22 (1921), for testing the sufficiency of a disqualifying affidavit. Appellees argue that the affidavit here "asks the Court to assume that the judge will violate his oath and sell his judgment for the Delegate's support" and that it "assumes that the Delegate * * * would violate her oath of office and make a corrupt bargain with the judge." Affiant does not ask the Court to make any such assumptions, for the simple reason that such assumptions are not a prerequisite to a finding that the affidavit is legally sufficient. If, as the appellees apparently misconceive the standard of legal sufficiency, an affidavit of bias were required to set forth words or deeds of the judge which justified a finding of such a "corrupt bargain," then a "sufficient" affidavit would not only disqualify the judge in a particular case, but should result in his removal from judicial office. This is obviously not the standard adopted in the *Berger* case.

An assumption that a judge will "violate his oath" or "sell his judgment" is no more material to the question of the sufficiency of a disqualifying affidavit of bias than it is to the question of disqualification by reason of consanguinity or pecuniary interest. The only pertinent question is "whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the judge." *Hurd v. Letts,* 152 F. 2d 121, 123 (C.A.D.C. 1945). The inquiry need not and should not proceed beyond that point. Thus, under the *Berger* standard, not only is it unnecessary to assume that the judge "will sell his judgment," it is not even necessary, for obious reasons, to make a finding of fact that the judge is biased. Mr. Justice McReynolds made this point clear in the *Berger* case when he said at page 43:

> "Of course, no judge should preside if he entertains actual personal prejudice toward any party and to this obvious disqualification Congress added *honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances.*" (Italics added.)

A determined effort is made in appellees' brief to gloss over the specific facts and reasons upon which the affiant's belief of bias is based and to treat the charge as one that

> "* * * could be brought against any judge in any court before whom appear persons of affairs, power, influence or wealth." (Appellees' brief, page 12.)

No such generalization is justified under the facts of this case. The facts here are peculiarly unique as to time and place as well as the actions and objectives of the individuals involved. The power, influence or wealth of a litigant, standing alone, is not the point involved in this case. Here, after the relationship of litigant and judge had already been created by Delegate Farrington, the Circuit Judge voluntarily created a new relationship between himself and the Delegate which is incompatible with that of litigant and judge.

II. AT THE TIME THE AFFIDAVIT WAS FILED, ONLY PRELIMINARY LEGAL ISSUES HAD BEEN DISPOSED OF BY THE CIRCUIT JUDGE.

A large part of the appellees' brief is aimed at diverting attention from the facts and reasons stated in the disqualifying affidavit to an argument that appellants' "interest in removing the judge is that of an unsuccessful litigant." In support of this contention, appellees state, at page 17 of their brief, that at the time the affidavit was filed

> "The only issue then remaining was the appointment of a successor trustee or trustees."

Such underemphasis can hardly relegate the very essence of the case to the insignificant status of the "only issue then remaining." The record makes clear that the sole objective of the litigants in Civil No. 139 was, and still is, to secure the appointment of their respective nominees, or persons not disqualified, as

trustees of the Farrington Trust. All prior proceedings were concerned solely with legal issues preliminary to a hearing on all of the many important factual issues necessarily involved in the selection of worthy persons qualified to act as trustees in the best interests of the estate and the beneficiaries.

Appellees ingenuously admit at page 17 of their brief that

> "This, it had been decided, *lay within the discretion of the judge.*" (Italics added.)

The very existence of such *discretionary* power in the Circuit Judge renders it doubly important that the exercise of such power be scrupulously impartial and free from any facts from which a sane and reasonable mind might fairly infer personal bias on the part of the Judge.

III. CANON 30 OF THE CANONS OF JUDICIAL ETHICS IS CLEARLY APPLICABLE.

Appellees assert at page 21 of their brief:

> "Since Canon 30 permits the trial judge to be a candidate for the federal judgeship, we fail to see how appellants can charge him with violating the canon by that very act."

Appellants, of course, do not deny that the Circuit Judge was free under the canon to become a candidate for the Federal judgeship. We place no significance upon that act, taken by itself. A violation of Canon 30 arises from the circumstances surrounding the Judge's candidacy. These circumstances are highly

significant. *First,* by reason of her official position as Delegate to Congress for Hawaii, Delegate Farrington virtually holds the key to the success or failure of the Circuit Judge's candidacy for the Federal judgeship. *Second,* at the time the Judge made himself a candidate for the Federal judgeship, Delegate Farrington, in litigation pending before him, was seeking to persuade the Judge to exercise his judicial discretionary power by appointing her as a trustee of a substantial trust estate, over the objections of appellants, all of whom are beneficiaries of the trust. *Third,* after public announcement of his candidacy, the Circuit Judge continued, and still continues, to sit as judge in that litigation. *Fourth,* after the Judge's public announcement of his candidacy, Delegate Farrington persisted in her efforts to persuade the Circuit Judge to appoint her to such trusteeship. *Fifth,* the Circuit Judge did not withdraw his candidacy.

Clearly, such facts "might tend to arouse reasonable suspicion that [the Circuit Judge] is using the power * * * of his judicial position to promote his candidacy." *Canons of Judicial Ethics,* Canon 30.

IV. THE "LOCAL LAW" RULE IS INAPPLICABLE.

The most recent statement by the Supreme Court of the United States on the scope of review of decisions of the Supreme Court of Hawaii was made in *Waialua Agricultural Co. v. Christian,* 305 U.S. 91 (1938). In that case the Supreme Court said, at page 109:

> "Insofar as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory."

What was said in that case was no more than a restatement of the rule formerly applied by this Court. In *Fernandez v. Andrade,* 59 F. 2d 681, 683 (C.A. 9, 1932), this Court said:

> "It is well settled that local tribunals will not be overruled upon matters of purely local concern except in case of manifest error."

The *Waialua* case itself indicates that no change in this existing rule was intended when, at page 107, it refers

> "* * * to the rule of this Court that deference will be paid the understanding of Territorial courts on matters of local concern."

The lower Court, in failing to hold the Circuit Judge disqualified under Section 84 of the Hawaiian Organic Act (48 U.S.C.A. Sec. 636), decided an issue, the correct decision of which depends wholly upon the construction or application of a law of the United States. This is a Federal question and not a matter of "local law." *Gully v. First National Bank,* 299 U.S. 109 (1936). The rule of the *Waialua* case, therefore, obviously has no application in this appeal insofar as that issue is concerned.

Even aside from that issue, the "local law" rule is not properly applicable to any aspect of this appeal. This is not an ordinary civil action in which one of the parties seeks to recover money or property from another. Nor is this a case such as the *Waialua* case, which involved the validity of instruments and contracts executed within the Territory—a matter solely of local concern. Neither does this case involve the interpretation and application of a Territorial statute dealing with local property or civil rights. Decisions of this Court and of the United States Supreme Court which have invoked the "local law" rule find no parallel in this case. Here the controversy involves the disqualification of a judge under a system of courts established by a Federal law (48 U.S.C.A. Sec. 631)—a circuit judge appointed by the President of the United States by and with the consent of the Senate under authority of an Act of Congress (48 U.S.C.A. Sec. 633), whose tenure of office and qualifications are governed by Federal law (48 U.S.C.A. Sec. 633) and whose basic salary is established by an Act of Congress and paid by the United States (48 U.S.C.A. Sec. 634a). It seems apparent, therefore, that this appeal concerns more than mere questions of "local law" or even "general law" on matters of "local concern."

As was said in the *Waialua* case, this Court undeniably has "complete power to review any rulings of the Territorial court on law or fact" under Section 1293 of Title 28, U.S.C.A. The voluntary restriction of this appellate jurisdiction, as embodied in the

"manifest error" rule should not, we submit, be extended to a case directly involving a judge in a system of courts established by and so directly dependent upon Federal law.

We find nothing in *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368 (1949); *Ward v. Booth,* 199 F. 2d 963 (C.A. 9, 1952), or *De Mello v. Fong,* 164 F. 2d 232 (C.A. 9, 1947), cited by appellees, which would require the extension of the "local law" rule to a case of this nature. The vast distinction between this case and the typical "local law" case is illustrated by *Walker v. O'Brien,* 115 F. 2d 956, 957 (C.A. 9, 1940). In that case, which involved the interpretation of a trust deed, this Court specifically called attention to the factors which characterized the case as one of "local law":

> "The deed was executed in Hawaii. The property it conveyed was situate in Hawaii. The trustor, the trustee and all beneficiaries of the trust resided in Hawaii. The Supreme Court, therefore, was required to and did construe the deed in accordance with its understanding of the laws of Hawaii."

It should further be noted that the legal sufficiency of an affidavit under Section 9573 had not been passed upon by the Supreme Court of Hawaii until this case. The lower Court itself expressly relied upon Federal cases arising under a similar Federal statute when it said (R. 19) that such cases "should be deemed applicable to said Section 9573" and that it "should be construed or deemed modified accord-

ingly." The lower Court decision, therefore, was not based upon any settled principle in the Territory of Hawaii. Under such circumstances this Court should not consider itself bound to accept as conclusive the lower Court's opinion that the affidavit is legally insufficient under the standard applied in the Federal cases. *Barber v. Pittsburgh, Ft. W. & C. Ry. Co.,* 166 U.S. 83, 103 (1896).

V. THE LOWER COURT'S DECISION IS MANIFESTLY ERRONEOUS.

Even if the "local law" rule were deemed applicable to this appeal, it is our contention that the decision of the majority of the Court below, holding the affidavit legally insufficient under the tests applied in the *Berger* case, was manifestly erroneous.

This is not a case such as *Walker v. O'Brien, supra,* in which the Court viewed the case as calling for a choice between a narrow and a broad construction of a term used in a trust deed. This Court said, at page 957, that the adoption of the broad construction by the lower court did not make that construction manifestly erroneous inasmuch as

> "The term has often been thus broadly construed."

In the instant case the Court is not confronted with any such choice between varying interpretations or applications of governing principles or rules. The choice here is between black or white; there can be no off-shades. The affidavit is, as a matter of law,

either legally sufficient or legally insufficient under the rules established by the *Berger* case and upon which the lower Court professed to rely. We have already shown in this brief and in our opening brief that the facts and reasons stated in the affidavit give more than fair support to the affiant's belief that the Circuit Judge has a personal bias in favor of an opposing party. The lower Court, therefore, erred in holding the affidavit legally insufficient. This error, we submit, is clear and manifest. Surely, it is no less "manifest" than that error found in *Damon v. Hawaii,* 194 U.S. 154 (1904); *Carter v. Hawaii,* 200 U.S. 255 (1906), and *Bierce v. Waterhouse,* 219 U.S. 320 (1910), in which the Supreme Court of the United States reversed the Hawaiian Supreme Court in matters of purely local concern.

CONCLUSION.

Both the appellees' brief and the majority decision below proceed on the theory that absence of words or deeds showing some kind of "corrupt bargain" between the Circuit Judge and the Delegate renders the affidavit insufficient. They have confused *impeachment* for corrupt conduct with *disqualification* to sit in a particular case by reason of honestly entertained belief of *bias* "based upon fairly adequate facts and circumstances."

This failure by the Court below to recognize the vast distinction between *impeachment* and *disqualification* explains the error of the majority of the Court

below in holding the affidavit legally insufficient. The holding interjects into the law of disqualification a requirement of examination into the character traits and other subjective elements characterized by a judicial mind. It seems obvious that an objective rather than a subjective standard should be required. The error, we submit, is clear and manifest. More important, it directly involves the administration of justice in a Territorial Court over which this Court has been vested with supervisory and appellate power. Therefore, whether the error be deemed "manifest" or not, this Court should not hesitate to correct it.

Dated, Honolulu, Hawaii,
December 12, 1955.

Respectfully submitted,
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